

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANDRE JONES, et al.,

Plaintiff(s),

v.

RABANCO, Ltd., et al.,

Defendant(s).

No. C03-3195P

ORDER ON THE SPECIAL
MASTER'S REPORT REGARDING
FARAGHER-ELLERTH
DISCOVERY

This matter comes before the Court following the Special Master's review of Defendant's Privilege Log. The Report of the Special Master in this matter and the Special Master's annotated Index of Documents are filed at Docket Numbers 260 and 261. In some places, the Special Master's Report calls for production of a document after certain information is redacted. The documents requiring redaction before they are produced are marked with an asterisk in this Order. Where this Order calls for a redaction of a document, Defendant shall file the redaction on CM-ECF with the Court and under seal. The code used to replace the redacted information shall also be filed electronically with this Court and placed under seal. For the time being, the Court will retain the documentation submitted to the Special Master for the purposes of making an *in camera* comparison of the redacted documents and the unredacted documents, to assure that the redaction is fair.

The Court, having reviewed the documents in the Defendant's Privilege Log, having read the Special Master's Report, and being otherwise fully advised, does now Order the Defendant to produce to Plaintiff the following documents pursuant to the Report of the Special Master:

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2	Volume I	00079-90
3		00024-0026
4		01475
5		00028-29
6		00116-00121
7		00129
8		00107-08; 00112-114
9		00170-175
10		00147-8
11		00054-55
12		01638-40
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14	Volume II	00301
15		000200-215
16		00647
17		00429
18		00514
19		00648: all except redact e-mail dated 6/19/03, 7:01
20		00430-00431: all except redact as above
21		00645-00646: all except redact as above
22		00435
23		01380-01384: all except redact 00644
24		00943
25		00941
26		00473-00474
27		00475-00476 & 01513-01514

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01509
01510
00477-00478
00258
00254-00255
00217 and 00247
00441-00443 and duplicates
01368-01379
00190-00198
00259-00261
00453-00454 and duplicates
00249-00251* and duplicates with a code number substituted for the names of
non-plaintiffs and non-NAACP complainants. These codes to be the same on all documents following
where the same names appear.
00448-00449* and duplicate, and produced as above
00665-00668* produced as above
00366* produced as above
01508* produced as above
00450-00452* produced as above
01534-01536
00669
00455-00457
00670-00672 and duplicate
00461-00462
00528-00529

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2		00300
3		00407
4		00265-00267
5		00389-00399* with names coded as above
6		00336-00350* with names coded as above
7		00408-00415* “
8		00358-00365* “
9		00308-00323* “
10		00521-00527* “
11		00673-00687* “
12		00927-00938* “
13		00530-00543* “
14		00688-00702* “
15		00703-00719* “
16		00268-00273* “
17		00372-00388* “
18		00356-00357* “
19		00302-00306* “
20		00367-00371* “
21		00351-00352* “
22		00353-00355* “
23		00400-00406* “
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25	Volume III	00571-00579 and duplicate
26		00725-00733 and duplicate
27		00734-00738

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00765-00773 and duplicate

00774-00782 and duplicate

01258-01263

01248-01257

01237-01247

01225-01235

01212-01224

01130-01140

01119-01129

00739-00746

01433-01434

00274-00277

01167 e-mails dated 10/14/03 at 7:48 & 8:37 a.m. only

01425-01429

01442-01451

01499-01507

01463-01465

01612-01617

01466-01467

Volume IV 00218-00233 with entries that post-date 10/24/03 redacted; if the entry was started prior to 10/24/03, the entire entry must be produced.

00245-00246 unless Rabanco produces a signed affidavit within ten days of this Order by the creator of the document that it was prepared after October 24, 2003.

Settlement Documents:

The Court disagrees with the Special Master's recommendation that documents pertaining to settlement discussions or offers should be disclosed under the Faragher-Ellerth doctrine. Judge Learned's interpretation of the settlement documents in this case as remedial measures that should be disclosed due to Rabanco's assertion of an affirmative defense is a reasonable one, if one reads this Court's February 15, 2005 Order very broadly. However, upon a close reading of Faragher v. City of Boca Raton and Burlington Industries, Inc. v. Ellerth, one sees that the Supreme Court's motivation to create the affirmative defense for employers facing vicarious liability under Title VII for the actions of their supervisors was fueled by a policy that favored giving an employers an incentive to prevent and respond quickly to allegations of harassment. 524 U.S. 775, 806 (1998); 524 U.S. 742 (1998). In its discussion of this defense in Faragher v. City of Boca Raton, the Court emphasized that this defense bolstered the already-established EEOC policy of giving employers an incentive to prevent sexual harassment. 524 U.S. 775, 806 (1998). The Court noted that the primary purpose of Title VII is not to provide redress, but to avoid harm. Id. The Court also observed that the employee's concomitant duty to "avoid or mitigate harm" is reflected in the second prong of this defense. Id. In Faragher, the Court expressed concern over the financial repercussions that harassing supervisor behavior could have for ordinary employees, should they be fired or choose to leave their jobs rather than put up with the harassment. Id. at 804. The Court set up the affirmative defense to encourage employers and employees to act BEFORE the damage was so serious that the employment relationship was broken and the parties were in litigation or pursuing settlement. The logical result of this reading of the cases and accompanying literature is that the draft settlement agreements are undiscoverable because they are beyond the scope of the investigatory and remedial actions that the Supreme Court incentivized for employers by allowing them to be used as an affirmative defense to allegations of supervisor harassment. For this reason, the Court will allow the documents pertaining to settlement plans and draft settlement offers to remain privileged. The settlement documents that shall remain protected are numbered as follows:

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2 00307
3 00544-00545
4 00546-00547
5 00720-00724
6 00613-00617
7 00548-00549
8 00600-00601
9 00602-00605
10 01298-01301
11 01264-01269
12 01394-01403
13 01392-01393
14 01302
15 01305-01309
16 01310-01315
17 01202-01204 e-mail of 9/24/03, 12:48 only
18 01322-01327
19 0921-00926
20 01317-01321
21 01329-01333
22 01205

Attorney Fees:

The Court finds that there was not a good faith basis for non-disclosure of many of the above documents, after the court's order of February 15, 2005, except for those involving proposed settlements. The documents ordered to be disclosed are approximately one third of the whole. Therefore, Rabanco shall pay 67% of the

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2 Special Master's fees, and plaintiffs 33%. Payment is due and owing upon the
3 receipt of the Special Master's bill. All documents shall be produced to Plaintiff
4 within ten days of this Order.

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6 The Clerk of the Court shall direct a copy of this order be sent to all
7 counsel of record.

8 Dated this 15th day of August, 2005

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12 Marsha J. Pechman

13 United States District Judge
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